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ABSTRACT

Counselors in colleges have found themselves increasingly called into litigation and legal confrontation. By knowing basic concepts of law, counselors can both better protect themselves and improve their services to students. Five specific topics involving law and the counselor that seem to arise most frequently in the work of college counseling personnel are: (1) the personal liability of the counselor; (2) the difference between confidentiality and legal privilege; (3) the counselor's duty to warn; (4) the due process rights of students; and (5) how a counselor as agent for the college can bind the college to promises made by the counselor to students. Counselors should raise questions about safeguards needed for themselves with their college's attorney in order to arrive at an acceptable way to address problems in light of specific circumstances and state law. (ABL)

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"The Law and College Counselors"

A Presentation to the Twenty-Fourth
Annual Southeastern Conference of Counseling
Center Personnel

by

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

The title "The Law and Counselors" speaks to a natural tension between the professional ideals of campus counselors seeking first to assist students and the legal necessity to know and observe state and federal laws and student's rights in the practice of counseling. Since 1961, when Dixon v Alabama State Board of Education was the first case in our history to hold that students in public colleges have constitutional rights, counselors have found themselves increasingly called into litigation and legal confrontations. Still, by knowing basic concepts of law, counselors can both better protect themselves and improve their service to students in today's atmosphere where law is a fact of life on campus.

Five specific topics involving law and the counselor seem to arise most frequently in the work of college counseling center personnel. They are: (1) the personal liability of the counselor, (2) the difference between confidentiality and legal privilege, (3) the counselor's duty to warn, (4) due process rights of students and, (5) how a counselor as agent for the college can bind the college to promises made by the counselor to students. These five topics will be the focus of this paper.

1. The personal liability of the counselor. If a college counselor acts within the scope of duty then the college's liability insurance policy may cover the counselor's actions, if the college has a liability policy. Actions outside the scope of duty which may

include acting in ignorance of the constitutional rights of students, will not usually be covered by a college's liability policy, and a personal liability policy could be useful in such a case. Professional organizations sell personal liability policies to their members. A college counselor may wish to check on the college's liability policy, then find out what the college considers each counselor's "scope of duty" and then consider the possibility of buying personal liability insurance. (Miles, College Law, 1987, p. 109)

2. The difference between confidentiality and legal privilege essentially is that confidentiality is an ethical concept which usually cannot operate to block a counselor from having to testify about a client's conversation, if there is no legal privilege for counselors in the state where this takes place. Thus, counselors may wish to determine if there is legal privilege for counselors in their state, and what the counselors wish to do in the situation as the counselors and their attorneys determine it to be. (Miles and Blackburn, 1987, p. 5)

3. The counselor's duty to warn, refers to the college counselors (even those counselors in states that provide legal privilege for the counselor) duty to warn of a life-threatening situation that the counselor learns about through a counseling session. The Tarasoff v. Regents of the University of California (13

Cal. 3d 177, 529 P. 2d 553 (1974)) case held that a college counselor who learns of a possibly life-threatening situation has a duty to warn the intended victim and others, and may be sued if the counselor does not perform his/her duty to warn, even if the counselor in such a case has legal privilege as a college counselor. (Miles and Blackburn, 1987, p. 8, 9)

4. The due process rights of students are those constitutional rights of public college students which flow from the 5th and 14th amendments to the U.S. Constitution. Since the decision of Dixon v. Alabama State Board of Education, 294 F. 2d 159 (5th Cir. 1961), students in public colleges and universities have been considered to have the right to both substantive due process (the rule itself and the general result must be fair) and procedural due process (which means notice, a full evidentiary hearing, and explanation for students charged with behavioral offenses, including cheating, and some notice, informal hearing and explanation for students who may be forced to leave college for academic reasons such as failing grades). Administrators and counselors who do not know and practice the constitutional due process rights of public college students may be sued personally by such students even if the school cannot be sued, due to the sovereign immunity doctrine. (Miles, "Due Process

Rights of Students," 1987, p. 144). Thus, whenever a counselor is involved in a public college student's expulsion or suspension, that counselor should know and practice both substantive and procedural due process, as defined by the courts.

5. The counselor as agent can bind the college as principal to promises that the counselor makes to students. This principle pertains when a counselor tells a student, "if you take these courses you will graduate," the student takes the courses referred to, and then a higher administrator overrules the counselor, and blocks the student's graduation. In such a case, the student could sue both the counselor and the college for breach of the oral or written contract that the counselor made on behalf of the college by making a promise to a student, on the basis of which the student paid tuition and attended classes. A contract can also be formed by the custom or usage followed when a counselor advises students. To guard against litigation in such a case, the counselor should request the college to clarify who can represent the college to students, and how such promises can be put in writing and on computer programs, and be accessible to the necessary people in advising students.

CONCLUSION

It is hoped that the five points discussed here, though not exhaustive, will be useful to college counselors. The

safeguards needed for counselors to address legal questions in each of the five areas are worth taking in order to benefit both the college counselor and the student client. A counselor should raise his or her questions on these points with the college attorney in order to arrive at an acceptable way to address them in the light of specific circumstances and state law.

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